

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA A. MCNIEL,

Plaintiff-Appellant,

v

MICHIGAN STATE UNIVERSITY,

Defendant-Appellee.

UNPUBLISHED

January 20, 2011

No. 294423

Ingham Circuit Court

LC No. 08-001269-CD

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this employment dispute, plaintiff Patricia A. McNiel appeals as of right the trial court's order dismissing her Whistleblowers' Protection Act (WPA), see MCL 15.361 *et seq.*, claim against defendant Michigan State University (MSU) under MCR 2.116(C)(10). Because we conclude that the trial court did not err when it dismissed McNiel's WPA claim, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

McNiel began working for MSU in October 2001 as an administrative coordinator for a new on-line masters program called the Professional Master of Science in Food Safety (the program). When she first began to coordinate the program, Dr. Edward Mather was the program's director and McNiel's supervisor. The program was funded through grants obtained by MSU's National Food Safety and Toxicology Center (the Center).

In 2002, Mather requested that McNiel receive a \$6,000 pay increase—from \$40,000 to \$46,000—to reflect the fact that her new responsibilities including the teaching of a course. Mather also noted that McNiel had been instrumental “in helping to design, develop, and organize the program from its conception.” Despite the pay increase, McNiel apparently felt that she was undercompensated for her work.

In October 2004, Mather requested that MSU create a new fixed-term specialist teaching position for McNiel. In January 2005, MSU reclassified McNiel from her support staff position to a teaching specialist. The position had a fixed term that ran from January 1, 2005 to June 30, 2008 and paid an annual salary of \$61,200. McNiel stated that Mather originally intended to pay her \$60,000 for this position, but that she expressed concern about this because a co-worker, Trent Wakenight, was to make \$61,200 in his new position, which she felt involved the same

level of work. McNiel averred that Mather responded that her husband must make \$200,000 per year.

In October 2005, McNiel sent Mather a memo titled “Talking points for our next meeting” wherein she expressed concerns about her status. She noted that she did not care about titles—program coordinator versus program director—but felt embarrassed that she did not have access to the program’s financial statements. She also mentioned what she believed were professional slights, including her exclusion from meetings on a separate grant—the grant with which Wakenight was involved, the over-scheduling of a visitor so that the visitor would not have time to meet her, and the loss of her student assistant to medical school without a replacement. She also mentioned that she believed Wakenight was receiving automatic raises and additional compensation under his position that gave him a significant pay advantage over her. Finally, she closed by stating that she would leave the program for other employment at MSU or leave MSU altogether “with proper compensation,” if necessary.

At her deposition, McNiel testified that she felt that she deserved greater compensation for her accomplishments with the program; she stated that Mather could “hardly turn on a computer” and “none of them”—referring to her coworkers at the Center—had any experience in “distance education.” As a result, she felt that they could never have made the program as successful as she did. In December 2005, McNiel’s salary was increased to \$63,200.

In April 2006, Dr. Julie Funk replaced Mather as the program’s director. McNiel met with Funk to discuss McNiel’s position in May 2006 and McNiel again expressed concern that she deserved greater compensation. Funk responded in a memo that her research showed that McNiel actually had an above-average salary—she noted that the only specialists who were paid more had superior credentials or greater years in rank. For that reason, she concluded, any further salary increases would be determined “with the traditional annual review process.”

McNiel continued to feel that she was under compensated and complained to Funk. In a July 2006 memo, McNiel reiterated that her compensation was not commensurate with her “accomplishments.” She further stated that she wanted access to the program’s “financial reports for the past 3.5 years” and an outside audit because the “financial folks have not known the difference between a balance sheet and income statement.” She noted that she did not receive any “monies” from the tuition paid for a class and that she wanted a “bonus” to compensate her for her “achievements for the past two years” that had made the program a success. She claimed that she herself made the program a \$1.3 million dollar success and yet she did not receive the 10% salary increases that Wakenight and Kristie Gates recently got for their work with a different program.

In September 2006, Funk advised McNiel that her tasks as the director of alumni relations for the program would be taken over by Mather. McNiel sent an e-mail in response expressing appreciation for Mather’s offer to be involved, but stating that she did not wish to “step down” as director of alumni relations.

In October 2006, McNiel sent a memo to Mather in which she complained that her co-workers, including Wakenight and Gates, had cut off communications with her. She also accused Mather of cutting off communications and trying to derail her career at MSU. She told him that she had no intention of “stepping down” as the director of alumni relations for the program. She sent a copy of her memo to several people, including Funk.

In that same month, McNiel’s salary increased to \$65,096.

McNiel sent another memo outlining grievances to Funk in January 2007. She first reiterated that she would not “relinquish my title of ‘Alumni Relations’” for the program. She stated that she would not give up the title because she did not feel that she should “have to be humiliated by this organization so that we can have some of Dr. Mather’s free labor.” McNiel also expressed her belief that one faculty member should be fired and stated that she had concerns with another faculty members reviews. She stated that she did not agree with Funk’s decision to no longer pay for McNiel’s cell phone plan, but that she accepted it. However, she requested that she be relieved of “any further travel” duties because she would not feel safe without a cell phone. She again expressed concern that she should have access to the program’s financial records—even going so far as to state that she felt that there were some “funny financial things” going on—and again recommended an outside financial audit. Finally, she mentioned that she had contacted the faculty grievance committee concerning the fact that she was constantly “shunned” at the office and was working in a “hostile environment” ever since she sued a local restaurant.

Funk responded by e-mail on January 11, and assured her that no one was trying to derail her career. She also explained that the program’s endowment was governed by a board and that McNiel’s accusations of financial impropriety were “very serious charges” that should not be “made lightly or without proof.” She also noted that she had examined the Center’s books and saw no impropriety and asked McNiel who it was that she was accusing and of what was she accusing them.

After sending McNiel this e-mail, Funk sent McNiel a written warning—dated January 12, 2007—that her behavior was “unacceptable” and that the failure to correct the behavior might warrant “disciplinary action and can lead to dismissal for cause.” Specifically, Funk stated that McNiel’s request to no longer travel could constitute a “refusal to perform reasonably assigned duties.” She also stated that she did not have the authority to refuse to “relinquish the Alumni Relations designation” and that the continued “representation of your self in that capacity is misrepresentation and grounds for dismissal.” Funk also informed McNiel that it was not within the scope of her authority to recommend firing a professor or to oversee the program’s finances. She also noted that McNiel’s performance was not evaluated “in light of financial components” of the program. She also reminded McNiel that allegations of financial impropriety were very serious and that she should give specific examples. Funk closed by stating that, to avoid disciplinary action, McNiel would have to “perform reasonably assigned duties” and develop “behavioral skills that will allow you [to] handle anger and conflict regarding management decisions in a more professional manner.”

In April 2007, McNiel requested a meeting with Christopher Brown, who was the Dean of the College of Veterinarian Medicine, to discuss “repulsive, unprofessional and unacceptable” behavior at work. However, she did not explain what specific acts were at issue.

Scott Winterstein, the acting director for the Center, sent McNiel a written response dated April 17, 2007. In the response he stated that it was irresponsible for McNiel to make blanket and unsubstantiated claims of improper behavior within the program or Center. These claims, he explained, can do irreparable damage to the reputation and career of persons associated with the program or Center. He also warned that, if she continued to behave in this manner, it could lead to her dismissal. Specifically, he instructed her to stop making claims that other individuals are acting in a “repulsive, unprofessional and unacceptable manner” and are trying “to force you out” unless she is prepared to present specifics. He further stated that he had no desire to take action against her, but that he could not “tolerate you, or anyone else, making potentially libelous statements about the Center’s personnel.”

After their April 20 meeting, Brown sent a letter to McNiel summarizing the issues that she raised and his response. Brown noted that McNiel felt that she had been the victim of gender-based wage discrimination and that he recommended that she should take formal action if that was her belief.

After the most recent series of McNiel’s allegations, Funk sent McNiel another written warning that was dated April 30, 2007. Funk stated that McNiel continues to make “broad accusations” and use “inflammatory language” without giving specifics despite having been warned not to do so in written and oral communications. This behavior, Funk explained, “has negative and disruptive impacts on the working group” and ultimately hurts the program. She also explained that McNiel did not have duties outside her assigned hours and, therefore, did not require a cell phone under MSU business procedures and warned that the failure to accept this “represents an unwillingness to follow business procedures and is unacceptable.” She also told McNiel that there would be no more meeting regarding her grievances outside the formal grievance procedures.

McNiel responded to Funk’s written warning by listing her many grievances, including lack of compensation, elimination of her cell phone plan and home internet access, loss of her MSU credit card privileges, loss of compensation for professional organization dues, loss of her title as leader of alumni relations, and being shunned at work. She also stated that she planned to file a formal wage-discrimination claim with MSU’s anti-discrimination office.

After meeting with McNiel for an annual review, Funk sent a written letter summarizing the review. In the letter, which was dated August 14, 2007, Funk stated that she would “honor and respond in a professional manner to whatever decision is brought forward” regarding McNiel’s internal wage discrimination claim and that she expected “all parties” to conduct themselves professionally after the final report. Funk also reminded McNiel that they had had a difficult year as a result “of your behavior in the workplace” and that it appeared from McNiel’s recent responses that she did “not intend to improve [her] behavior.” In closing, Funk stated that she did not intend to “request reappointment of your position” when the term expired in June 2008. In another memo dated the same day, Funk accused McNiel of misquoting her statements.

Funk “categorically” denied that her review was related to either her lawsuit against the local restaurant or “your concerns of unequal pay.”

In September 2007, McNiel filed a formal wage discrimination complaint with the Michigan Department of Civil Rights. On the same day, she also sent notice to Funk and others that she had filed the claim.

In October 2007, the MSU investigator assigned to McNiel’s wage-discrimination claim determined that McNiel was not similarly situated to Wakenight and, for that reason, concluded that McNiel had failed to establish that she was paid less on the basis of gender. As such, the investigator recommended dismissing McNiel’s internal complaint. The Civil Rights Commission also determined that there was insufficient evidence of wage-discrimination and dismissed McNiel’s complaint in November 2007.

In a letter dated January 15, 2008, Brown formally informed McNiel that she would not be reappointed to her position.

In September 2008, McNiel sued MSU. In her complaint, McNiel alleged that her sex was a motivating factor in the decision to pay her less contrary to Michigan’s Civil Rights Act, see MCL 37.2101 *et seq.*, and that MSU violated the federal equal pay act, see 29 USC 206(d)(1). She also alleged that Funk did not reappoint her to her position in retaliation for McNiel’s decision to file a wage-discrimination claim in violation of Michigan’s WPA.

In August 2009, MSU moved for summary disposition of all McNiel’s claims. With its motion, MSU presented evidence that McNiel actually made the same or more than Wakenight until May 2006. It also presented evidence that Wakenight’s job responsibilities after May 2006 were significantly different from McNiel’s responsibilities. Because McNiel could not demonstrate that she was paid less than a similarly situated male employee, MSU argued that the trial court should dismiss McNiel’s claims of wage-discrimination under the Civil Rights Act and the equal pay act.

MSU also argued that there was no evidence that Funk’s decision to not request McNiel’s reappointment at the end of her employment term was causally connected to McNiel’s gender-based wage discrimination claim. MSU further maintained that the evidence showed that Funk chose not ask for McNiel’s reappointment because of McNiel’s unprofessional conduct and in order to reorganize the department. Because this was a legitimate non-discriminatory reason, McNiel had the burden to come forward with evidence that it was a mere pretext, which she could not do. For these reasons, MSU asked the trial court to dismiss McNiel’s claims.

In response to MSU’s motion, McNiel conceded that she did not have sufficient evidence to sustain her claims of discrimination under the Civil Rights Act and under the equal pay act. However, she argued that there was sufficient evidence to sustain her WPA claim. McNiel claimed that the evidence shows that she had a good faith belief that MSU paid her less because of her gender. As such, after she formally complained of gender-based wage discrimination, she was engaged in activity protected under the WPA. Further, she maintained, there was evidence that Funk’s decision not to seek her reappointment was connected to her complaint of wage discrimination. McNiel stated that, in addition to timing, Funk admitted in her deposition that

her decision was motivated by McNiel's complaints. She also noted that Funk's two written warnings and Winterstein's e-mail are evidence that the decision to not reappoint her was in retaliation for her claims of discrimination in pay. McNiel further argued that this same evidence was sufficient to show that Funk's proffered reason for not seeking her reappointment—namely, her unprofessional conduct—was a mere pretext. She also maintained that, had her unprofessional conduct been the real reason, Funk would have dismissed her rather than let her term expire.

At the hearing on MSU's motion, the trial court acknowledged that McNiel had conceded that her claims based on wage discrimination should be dismissed. The trial court then determined that the evidence cited by the parties did not establish a question of fact on the issue of causation. For that reason, the court concluded that it must dismiss McNiel's claims.

The trial court entered an order dismissing McNiel's claims on September 15, 2009. This appeal followed.

II. WPA CLAIM

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Summary disposition under MCR 2.116(C)(10) is appropriate where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

B. CAUSAL CONNECTION

In order to establish a prima facie case of unlawful retaliation under the WPA, the plaintiff must establish that she was engaged in an activity protected under the statute, that she suffered an adverse employment action, and that a causal connection exists between the protected activity and the adverse employment action. *West v General Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). Once the plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant to establish a legitimate business reason for the adverse employment action. *Shaw v Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). If the defendant produces evidence that the adverse employment action had a legitimate, non-retaliatory reason, the burden shifts back to the plaintiff to present evidence that the proffered reason was merely a pretext. *Id.*

Here, it is essentially undisputed that McNiel suffered an adverse employment action and that she was engaged in a protected activity. However, the parties dispute whether there was evidence to establish a question of fact as to the causal relationship between McNiel's decision to report alleged gender-based wage discrimination and Funk's decision not to seek McNiel's reappointment.

A plaintiff may establish a causal connection through either direct evidence or indirect evidence and circumstantial evidence. Direct evidence is that which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions. To establish causation using circumstantial evidence, the "circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." [*Id.* at 14-15 (citations omitted).]

In response to MSU's motion for summary disposition, McNiel argued that the evidence established a question of fact as to the causal relationship between Funk's decision not to seek McNiel's reappointment and McNiel's reports of gender-based wage discrimination. Specifically, McNiel noted that there was evidence of a close temporal relationship between the decision not to seek her reappointment and the time when she informed Funk of her decision to file a wage discrimination claim, that there was evidence of a "generalized pattern of retaliation"—as exhibited by three disciplinary letters, and that Funk admitted that the sole reason for not seeking McNiel's reappointment was because of McNiel's complaints, which presumably included her complaints of unlawful wage discrimination.

Here, there is evidence that Funk decided not to seek McNiel's reappointment after McNiel filed two formal complaints of unlawful wage discrimination. But the temporal relationship—standing alone—does not establish a causal connection. A temporal relationship between an adverse employment action and engagement in protected activity is insufficient by itself to establish causation—a plaintiff must "show something more than merely a coincidence in time between the protected activity and adverse employment action." *West*, 469 Mich at 186. This is because such proof merely established that the adverse employment came *after* the employee's protected activity, not that the employer's decision was influenced by the employee's protected activities. *Id.* at 185. Further, although McNiel argued to the trial court that she began to engage in protected activity when she reported her gender-based wage discrimination claim to Mather in August, it is undisputed that she first told Brown that she intended to file a formal complaint about the wage discrimination on April 20, 2007. Thus, Funk's decision to not seek her reappointment came several months after McNiel's wage discrimination complaints.

The evidence that McNiel cites for the proposition that Funk and others had a general retaliatory animus against her is also insufficient to establish causation. The record contains clear evidence that McNiel complained about her compensation, perks, and fellow staff on numerous occasions. There is also evidence that her superiors admonished McNiel about the harmful way that she made her complaints and the unprofessional way that she responded to their handling of her complaints. These admonishments clearly included threats of disciplinary action. However, the admonishments do not establish a causal connection between McNiel's reports of wage discrimination and Funk's decision not to seek McNiel's reappointment.

It must be noted that two of the written complaints—Funk's written warning of January 12, 2007, and Winterstein's written response of April 17, 2007—occurred before McNiel informed anyone that she intended to file or had filed a formal complaint. Thus, these admonishments occurred before Funk or Winterstein could have been motivated by a desire to retaliate, because McNiel had not yet made any wage discrimination claims. See *id.* at 187-188. Likewise, although the evidence clearly established that Funk knew about McNiel's wage

discrimination complaints as of her last written warning, that warning, like the others, does not mention wage complaints premised on gender discrimination. Rather, each of the written warnings emphasize McNiel's unprofessional conduct; specifically, McNiel's decision to make broad allegations of impropriety against the program, the Center, and her coworkers without giving any specific details. They also explained that McNiel's broad and unsubstantiated allegations were harming the staff, the program, and the Center. Funk also noted that McNiel's responses to her decisions with regard to certain employment matters—namely the transfer in alumni responsibilities and the issue of cell phones—were unprofessional and could warrant discipline.¹ When examined together and in light of the other evidence, the e-mails and written responses merely establish that McNiel's employers *might* discipline her if she continued to make unfounded, generalized accusations, and continued to refuse to comply with her superiors' decisions; the evidence does not establish that her superiors had a propensity to engage in unlawful retaliation. Accordingly, a reasonable jury could not rely on this evidence—even in conjunction with the temporal relationship—to conclude that Funk decided not to seek McNiel's reappointment because McNiel filed a wage discrimination complaint. This is particularly true given that McNiel herself testified that it was her belief that Funk wanted to terminate her employment from the moment that Funk took over as director—that is, long before McNiel engaged in the protected activity at issue.²

¹ On appeal, McNiel argues that she was merely seeking answers to legitimate questions concerning these employment decisions and was not engaging in unprofessional conduct. However, the evidence clearly shows that McNiel repeatedly refused to give up her status as the person responsible for alumni relations, issued ultimatums with regard to her cell phone and internet access, and generally challenged all of Funk's decisions by characterizing them as part of a general conspiracy to derail her career. These letters, e-mails, and memos are strong evidence that McNiel was a difficult employee and that her superiors were becoming frustrated with her, but they do not establish that Funk—or anyone else—had a desire to terminate McNiel because she filed a claim of wage discrimination.

² We also reject McNiel's contention that Funk's decision to let McNiel's term expire, rather than fire her outright, and to tell her earlier than required under the terms of the contract that her position would not be reappointed, is evidence that Funk's decision was really motivated by McNiel's wage discrimination complaints. There are a myriad of reasons why Funk might have thought it best to simply let McNiel's term expire and to advise her about her decision early; and the fact that these things occurred does not by itself establish the likelihood of any one explanation over another. As such, in the absence of other evidence tending to highlight the reasons for these decisions, the jury would have to speculate that these decisions were motivated by a desire to retaliate against McNiel for making a wage discrimination claim.

Likewise, we do not agree that Funk admitted at her deposition that she did not seek McNiel's reappointment because McNiel filed a wage discrimination claim. At her deposition, Funk testified that she came to her decision on the basis of McNiel's unprofessional behavior:

I am putting in the issues that she made broad accusations without bringing specifics so we could act upon the complaints. It is not associated with the fact that she made wage discrimination complaints. It is associated with the fact that she would make broad complaints about people trying to derail her career without bringing up specifics. It is about her bringing up broad accusations of financial inappropriateness without bringing up specifics. It is about her unwillingness to accept MSU business policy despite demonstration of what those rules are. So those are the issues that are associated with the professional behavior that's not acceptable.

Funk also stated that the broad accusations that she referred to did not include her claims of wage discrimination. Reading this testimony as a whole, there is simply no statement that can reasonably be construed to include an admission that the decision not to seek McNiel's reappointment was motivated by a desire to retaliate against her for making a wage discrimination complaint.

Examining the evidence presented to the trial court on MSU's motion for summary disposition on the whole, there is no evidence to establish a connection between Funk's decision to not seek McNiel's reappointment and McNiel's complaints of unlawful wage discrimination. McNiel failed to present evidence sufficient to establish a question of fact as to the causal connection between the decision to not seek her reappointment and her engagement in protected activity. Therefore, MSU was entitled to summary disposition under MCR 2.116(C)(10). See *Barnard Mfg*, 285 Mich App at 375.

The trial court did not err in dismissing McNiel's WPA claim.

Affirmed. MSU being the prevailing party, it may tax costs. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause